Daniel Sarravana a/l Sandanasamy v Malathi a/p Manikam

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO WA-33–680–11 OF 2018
FAIZAH JAMALUDIN J
6 JULY 2020

Family Law — Divorce — Irretrievable breakdown of marriage — Divorce petitioner failed to prove irretrievable breakdown of marriage as required by Law Reform (Marriage and Divorce) Act 1976 ('the LRA') — LRA regarded marriage as irretrievably broken down only if one or more of criteria set out in s 54(1)(a) to (d) was proven — Whether divorce petition had to be dismissed on account of petitioner's failure to prove s 54(1) criteria

The petitioner ('Daniel') petitioned for divorce from the respondent ('Malathi') under s 53 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') on the ground their marriage had irretrievably broken down. Daniel prayed for a consequential order that Malathi return to him two rings and the 'thali' and 'thalikodi' chain or, alternatively, pay him RM11,830 as the value of those items. Without giving any particulars, Daniel pleaded that he and Malathi were no longer 'on the same direction' and did not understand each other and that she was no longer interested in living with him. Following their marriage, Malathi had moved in with Daniel and his parents in their cramped and congested low-cost apartment. The living conditions caused relationship problems that caused Malathi to subsequently return to live with her parents. Malathi did not want a divorce and denied that the marriage had irretrievably broken down. She felt her differences with Daniel were a 'family problem' which could be settled, but if the court decided to dissolve the marriage, Malathi cross-petitioned to be given a half-share in an apartment owned by Daniel and/or be entitled to half the rental of that property. She also prayed that Daniel be ordered to pay her RM3,000 per month as maintenance and return her gold chain and ring and RM10,400 she had loaned him.

Held, dismissing the divorce petition and cross-petition and all prayers sought by both parties:

(1) Daniel failed to prove that his marriage to Malathi had irretrievably broken down. He failed to prove that the circumstances causing or leading to the breakdown of the marriage fell within one or more of the four criteria set out in s 54 of the LRA, namely, adultery, unreasonable behaviour, desertion or living apart for at least two years. The breakdown

of the marriage was not caused by any of the criteria listed in s 54(1) of the LRA. Accordingly, Daniel's petition had to be dismissed (see paras 6–7, 19 & 30).

(2) Since the marriage was not dissolved, Daniel's application for the return of the rings, 'thali' and 'thalikodi' were dismissed; so also were Malathi's applications in her cross-petition for division of the matrimonial property and for maintenance. Since Malathi failed to prove that she had loaned Daniel RM10,400 or that he had taken her ring and gold chain, her prayers for the return of the said sum and items were also dismissed (see paras 8–9).

[Bahasa Malaysia summary

Pempetisyen ('Daniel') mengemukakan petisyen untuk perceraian kepada responden ('Malathi') di bawah s 53 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta tersebut') dengan alasan perkahwinan tersebut telah berpecah belah. Daniel mendoakan memohon suatu perintah berbangkit supaya Malathi mengembalikan semula dua cincin dan rantai 'thali' dan 'thalikodi' kepada beliau atau, secara alternatifnya, membayar beliau RM11,830 sebagai nilai barangan tersebut. Tanpa mengemukakan sebarang butiran, Daniel memplidkan bahawa beliau dan Malathi tidak lagi 'berada pada halatuju yang sama' dan tidak lagi saling memahami dan bahawa beliau tidak lagi berminat untuk tinggal bersamanya. Selepas perkahwinan mereka, Malathi berpindah bersama Daniel dan ibu bapanya di pangsapuri kos rendah mereka yang sesak dan sempit. Keadaan hidup menyebabkan masalah perhubungan yang menyebabkan Malathi kemudian kembali tinggal bersama ibu bapanya. Malathi tidak inginkan perceraian dan menafikan bahawa perkahwinan tersebut telah berpecah belah. Beliau merasakan perbezaannya dengan Daniel adalah 'masalah keluarga' yang dapat diselesaikan, tetapi sekiranya mahkamah memutuskan untuk membatalkan perkahwinan tersebut, Malathi mengemukakan petisyen balas supaya diberi setengah bahagian pangsapuri yang dimiliki Daniel dan/atau memberikan hak untuk setengah bahagian sewaan hartanah tersebut. Beliau juga memohon agar Daniel diperintahkan untuk membayarnya RM3,000 sebulan sebagai nafkah dan mengembalikan semula rantai emas dan cincinnya dan RM10,400 yang beliau telah pinjamkan kepadanya.

Diputuskan, menolak petisyen perceraian dan petisyen balas dan kesemua perintah yang dipohon oleh kedua-dua pihak:

(1) Daniel gagal membuktikan bahawa perkahwinan beliau dengan Malathi telah berpecah belah. Beliau gagal membuktikan bahawa keadaan yang menyebabkan atau membawa kepada keretakan perkahwinan tersebut jatuh dalam satu atau lebih dari empat kriteria yang ditetapkan dalam s 54 Akta tersebut, iaitu, penzinaan, berkelakuan dengan tidak munasabah, meninggal langsung atau tinggal berasingan

sekurang-kurangnya dua tahun . Keretakan perkahwinan tersebut tidak disebabkan oleh kriteria yang disenaraikan dalam s 54(1) Akta tersebut. Oleh itu, petisyen Daniel harus ditolak (lihat perenggan 6–7, 19 & 30).

(2) Oleh kerana perkahwinan tersebut tidak dibatalkan, permohonan Daniel untuk pengembalian semula cincin, 'thali' dan 'thalikodi' ditolak; begitu juga dengan permohonan Malathi dalam petisyen balasnya untuk pembahagian harta sepencarian dan nafkah. Oleh kerana Malathi gagal membuktikan bahawa beliau telah meminjamkan Daniel sebanyak RM10,400 atau bahawa beliau telah mengambil cincin dan rantai emasnya, permohonan beliau untuk pengembalian jumlah wang tersebut dan barangan juga ditolak (lihat perenggan 8–9).]

Cases referred to

Manokaram a/l Subramaniam v Ranjid Kaur a/p Nata Singh [2009] 1 MLJ 21; [2008] 6 AMR 177; [2008] 6 CLJ 209, FC (refd)
Mohan Raj St Patmanathan v Prema Rani a/p Kandiah Ponnampalam & Anor [2005] 4 MLJ 444, HC (refd)
Selvaduray v Chinniah [1939] 1 MLJ 253 (refd)
The Carbon Co Sdn Bhd & Anor v Ng Lee Hoon (conducting under 'Forest Wood Flooring') [2017] 4 MLJ 791; [2017] 6 CLJ 189, CA (refd)

Legislation referred to

Evidence Act 1950 ss 101(1), (2)
Law Reform (Marriage and Divorce) Act 1976 ss 53, 54, 54(1), (1)(a), (1)(b) (1)(c) (1)(d), (2), 76, 76(1), 77, 77(1)(a), (1)(b)

P Selvaraj (Raj & Co) for the petitioner.
Hamsagayathri (M Manoharan & Co) for the respondent.

Faizah Jamaludin J:

INTRODUCTION

[1] This is a petition for divorce by petitioner husband ('PH') under s 53 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') for his marriage to the respondent wife ('RW') to be dissolved on the grounds that the marriage had irretrievably broken down. He prays that the RW is to return to him two rings, the 'thali' and the 'thalikodi' chain or in the alternative pay him the sum of RM11,830, which he says is the value of the jewellery.

[2] PH pleads that the marriage had irretrievably broken down because both he and RW were no longer in the same direction and there no longer exists any understanding between them. Also, because RW no longer wants to live with him. In para 5 of the petition, PH pleads as follows:

A 5. Perkahwinan tersebut telah berpecah belah dan tidak dapat dipulihkan lagi kerana kedua-dua mereka tidak sehaluan. Butir-butir kepecebelahan adalah seperti berikut:

(a) Pempetisyen Suami dan Responden Isteri tidak sehaluan lagi dan mereka tidak mempunyai persefahaman yang wujud diantara satu sama lain; dan

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(b) Responden Isteri tidak ingin lagi tinggal bersama dengan Pempetisyen Suami.

C **[3]** PH does not give any particulars as to why he says that he and RW are no longer in the same direction and why there no longer exists any understanding between them.

[4] RW denies that her marriage to PH had irretrievably broken down. She also denies that she no longer wants to live with PH.

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[5] In her cross petition, the RW prays for: (i) half share in an apartment in Puchong which is registered in PH's name and/or half the rental proceeds derived from that property; (ii) spousal maintenance in the sum of RM3,000 per month; (iii) that PH return the sum of RM10,400 which she had loaned to him; and (iv) that PH return to RW her gold chain weighing 3g and her ring weighing 1g.

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[6] This court finds based on the evidence before this court that PH had failed to prove that the circumstances leading or causing the breakdown of the marriage falls within one or more of the four criteria set out in s 54 of the LRA. For this reason, this court finds that PH had failed prove that his marriage to RW had irretrievably broken down.

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G **[7]** Accordingly, PH's petition for divorce under s 53 of the LRA is dismissed.

[8] Furthermore, as no decree for the dissolution of the marriage is granted, PH's application for the return of the rings and the 'thali' and the 'thalikodi' are dismissed. RW's applications for the division of matrimonial property and spousal maintenance in her cross-petition are also dismissed.

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[9] This court further finds that RW had failed to discharge her burden of proving that the sum of RM4,400 given to PH just before the wedding reception was a loan. This court also finds that RW had failed to prove that she had loaned PH the additional sum of RM6,000 or that she left her ring and gold chain in PH's parents' house and that he had taken both items. Accordingly, RW's prayer for the return of the sum of RM10,400 and the return of the ring and gold chain are dismissed.

I

[10] The full reasons for my decision are set out in this judgment. A

BACKGROUND FACTS

[11] PH and RW were married on 22 February 2016. After their marriage, they went to live with PH's parents at Blok 08–01–02, PPR Seri Alam, Jalan Lapangan Terbang Lama, off Jalan Istana, 57100 Kuala Lumpur. There are no children to the marriage. B

[12] In her answer to the petition, RW pleads that on 2 April 2017, RW's parents came to the PH's parent's house where both PH and RW were living. PH's mother suddenly complained to RW's parents that RW does not do any of the housework. RW says that PH's mother had never said anything about the housework to RW or told her about it before this. RW says that she told PH's mother that she will try to do more housework even though she was working at that time in UWL Malaysia Sdn Bhd C D

[13] Three days later, on 5 April 2017, at approximately 6am, PH told RW that he will send RW to her parents' house. RW in her pleadings state that she did not agree to go her parents' house as she wanted to stay with PH and his family. She then went to work. At about 2pm on the same day, RW went to her parents' house and informed her father that PH wanted to send RW to her parents' house. RW says that her father then telephoned PH to ask RW why he took that decision. E F

[14] In his reply to the answer to the petition, PH denies that his mother had complained to RW's parents that she did not do any other housework. He also denies that RW's father had called him on 5 April 2017 and puts RW to strict proof. However, he admits that he had told RW at 6am on 5 April 2017 that he was going to send her to her parents' house. G

[15] RW in her pleadings state that PH had told her father that he had to take such a decision for the sake of his family and that RW should stay with her parents until his mother calms down. RW says even though she was not happy living separately from PH, for the sake of PH's family and to placate PH's mother, she agreed to stay with her parents for four days. On the fourth day, on 9 April 2017, she returned to her parents-in-laws house because PH failed to contact her. Just as RW arrived at the house, PH asked her to take all her things and return to her parents' house without giving any reasons. RW says that PH's mother had tidied all of RW's belongings and asked RW to leave the house. RW pleads that she loves PH and his family dearly but had to leave the house after being chased out of the house by her mother-in-law. H I

[16] PH does not deny that he had asked RW to take her things and return to her parents' house but he denies that his mother had packed RW's things and asked her to leave the house. He says that RW had taken all the things belonging to her including the ring, chain and all the wedding gifts.

[17] A few months later on 14 December 2017, RW went to PH's place of work to ask him to let her live with him and also to ask him for some monies for her living expenses, to pay her bills and to look after her parents. But PH advised her that the position in his house was still not calm and asked her to return to her parents' house and he promised to contact her.

HAS THE MARRIAGE IRRETRIEVABLY BROKEN DOWN?

[18] In deciding on PH's petition for divorce under s 53 of the LRA, the first issue for this court's determination is whether the marriage between PH and RW has irretrievably broken down as PH claims but denied by RW.

[19] It is trite law that the sole ground for divorce under s 53 of the LRA is that the marriage had irretrievably broken down. Faiza Thamby Chik J in the case of *Mohan Raj St Patmanathan v Prema Rani a/p Kandiah Ponnampalam & Anor* [2005] 4 MLJ 444 held that:

> (6) *The sole ground for divorce under s 53 of the Law Reform (Marriage & Divorce) Act 1976 ('the LRA') is that the marriage has irretrievably broken down*. Section 54 of the LRA enjoins the court (to enquire so far as it reasonably can) to have regard to one or more of the four (4) facts alleged as causing or leading to the breakdown of the marriage, namely, adultery (s 54(1)(a)), unreasonable behaviour (s 54(1)(b)), desertion (s 54(1)(c)) and living apart for at least two years (s 54(1)(d)). (Emphasis added.)

[20] Section 53 of the LRA provides as follows:

> (1) Either party to a marriage may petition for a divorce on the ground that the marriage has irretrievably broken down.
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> (2) The court hearing such petition shall, so far as it reasonably can, inquire into the facts alleged as causing or leading to the breakdown of the marriage and, if satisfied that the circumstances make it just and reasonable to do so, make a decree for its dissolution.

[21] Section 54(1) of the LRA provides that in its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one of the following facts:

> (a) that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

(b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

(c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;

(d) that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition.

[22] Pursuant to s 54(2) of the LRA, the court, in considering whether it would be just and reasonable to make a decree, shall consider all the circumstances:

including the conduct of the parties and how the interests of any child or children of the marriage or of either party may be affected if the marriage is dissolved and it may make a decree nisi subject to such terms and conditions as the court may think fit to attach, but if it should appear to the court that in all the circumstances it would be wrong to dissolve the marriage it shall dismiss the petition.

[23] As the petitioner for a divorce under s 53 of the LRA, s 101(1) of the Evidence Act 1950 requires PH to prove that his marriage to RW had irretrievably broken down and that the circumstances leading or causing the breakdown in the marriage falls within one or more of the four criteria set out in s 54 of the LRA. Section 101(1) of the Evidence Act 1950 states as follows:

101 Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[24] Pursuant to s 101(2) of the Evidence Act 1950, the burden of proof is on PH to prove the existence of the facts he asserts. This principle was explained by Terrell Ag CJ in *Selvaduray v Chinniah* [1939] 1 MLJ 253:

The burden of proof under section 102 of the Evidence Enactment is upon the person who would fail if no evidence at all were given on either side, and accordingly the plaintiff must establish his case. If he fails to do so, it will not avail him to turn round and say that the defendant has not established his. The defendant can say 'It is wholly immaterial whether I prove my case or not. You have not proved yours' (see the judgment of the Privy Council in *Raja Chandranath Roy v Ramjai Mazumdar* 6 Bengal Law Reports p 303).

[25] The Court of Appeal in *The Carbon Co Sdn Bhd & Anor v Ng Lee Hoon (conducting under 'Forest Wood Flooring')* [2017] 4 MLJ 791; [2017] 6 CLJ 189 stated this fundamental principle of evidence as follows:

> [49] The law on the burden of proof is so settled. Pursuant to s 101(1) of the Evidence Act 1950, a party who desires the court to give judgment in its favour as to the legal right or liability bears the burden to prove its case. The burden of proof on that party is twofold, firstly the burden of establishing a case and secondly the burden of introducing evidence. This burden lies on the party throughout the case and the standard of proof is on the balance of probabilities. Once that party has discharged its evidential burden of proof then the burden would then shift to its adversary. If a party has failed to discharge its burden of proof on the standard required by the law, his adversary does not bear the burden to adduce any evidence.

[26] The evidence shows that PH had asked RW to leave his parents' house three days after the incident which RW claims that PH's mother complained to RW's parents that she did not help with the housework. While PH agrees that he had told RW that he was going to send her back to her parent's house, he denies it was because his mother had complained to RW's parents that she did not do any housework.

[27] PH and RW from the beginning of their marriage on 22 February 2016 until she left the house on 9 April 2017 (either because she was chased out by PH and/or his mother as she claims or whether she had left on her own accord as he claims) had lived in his parents' house in the PPR Seri Alam. PPR stands for 'Program Perumahan Rakyat', which as stated in the official website of the Ministry of Housing and Local Government is a government program for the relocation of squatters and the housing requirements of the lower income group (B40). The living space in these houses are very small — the Ministry's website state that the PPR houses are single storey terrace houses of not less than 700 sqft. It would have been very cramped living conditions for PH and RW living together with his parents in their PPR Seri Alam house.

[28] RW clearly does not want a divorce. When asked by PH's counsel during cross-examination, RW testified that she does not want a divorce. She said that she does not want to enlarge this issue because it is a family issue and that she wants to settle the issue with PH but he does not want to.

[29] None of the reasons given by PH that the marriage had broken down, namely that he and RW were no longer in the same direction and there no longer exists any understanding between them or that RW no longer wants to live with him, falls within any one of the four criteria stipulated in s 54(1)(a) to (d) of the LRA as causing or leading to the breakdown of the marriage, which this court must have regard to.

[30] This court finds that it is clear from the facts of the case based on the pleadings and the testimonies of both PH and RW that the breakdown of the marriage was not caused by any of the criteria listed in s 54(1) of the LRA.

[31] Learned counsel for PH submits that the marriage had irretrievably broken down because the trial of this petition took place more than two years after the RW left PH on 9 April 2017, and accordingly falls within the criteria in s 54(1)(d) of the LRA.

[32] This appears to be a misreading of the provision of s 54(1)(d) of the LRA by learned counsel for PH, which I truly hope is not deliberate on the part of learned counsel, in order to mislead this court. Paragraph (d) of s 54(1) of the LRA states that one of the facts in its inquiry into the breakdown of the marriage, is that 'the parties to the marriage have lived apart for a continuous period of at least two years *immediately preceding the presentation of the petition*'. It is not two years preceding the date of the trial as submitted by learned counsel for PH. In the case of *Mohan Raj St Patmanathan v Prema Rani a/p Kandiah Ponnampalam & Anor* which PH's counsel himself had cited as authority to support his argument, the parties had lived apart for a continuous period years since 23 February 1999 before the petition was presented in 2001 — it was not two years from the date they separated until the date of trial in 2004.

[33] In this case, PH did not particularise in his pleadings nor did he provide any evidence that the circumstances leading or causing the breakdown in his marriage to RW falls within one or more of the four criteria set-out in s 54 of the LRA. Accordingly, this court finds that PH had failed to discharge the burden of proving that his marriage to RW has irretrievably broken down.

[34] By reason of PH's failure to prove that his marriage to RW had irretrievably broken down, this court finds that it is not just and reasonable for this court to grant a decree of divorce for the dissolution of PH and RW's marriage under s 53 of the LRA. Accordingly, PH's prayer for his marriage to RW to be dissolved pursuant to s 53 of the LRA is dismissed.

[35] As no decree for the dissolution of the marriage is granted, PH's application for the return of the rings, and the 'thali' and the 'thalikodi' chain presented to RW during their wedding is accordingly dismissed.

[36] With regards to RW's application for division of matrimonial property in her cross-petition, s 76(1) of the LRA states that:

> (1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

[37] The Federal Court in *Manokaram a/l Subramaniam v Ranjid Kaur a/p Nata Singh* [2009] 1 MLJ 21; [2008] 6 AMR 177; [2008] 6 CLJ 209 held

A that pursuant to s 76 of the LRA, courts only have the power to make an order for division of matrimonial assets when granting a decree of divorce or judicial separation. Since no decree of divorce is granted in this petition, this court cannot make an order for the division of matrimonial property

B **[38]** As for RW's claim for spousal maintenance in her cross-petition, the court's power to grant maintenance of spouse is derived under s 77(1)(a) and (b) of the LRA, which provides that the court may order a man to pay maintenance to his wife or former wife:

C (a) during the course of any matrimonial proceedings;

(b) when granting or subsequent to the grant of a decree of divorce or judicial separation;

[39] The matrimonial proceedings in this instant case comes to an end with D the delivery of this judgment by this court. Since this court did not grant a decree of divorce, it is not empowered to order PH to pay maintenance to RW under s 77 of the LRA.

[40] Accordingly, for these reasons, as no decree for the dissolution of the E marriage is granted, RW's applications for division of matrimonial property and spousal maintenance in her cross-petition are dismissed.

[41] With regards to RW's claim for the return of the sum of RM10,400 she claims to have loaned PH and the return of her ring and gold chain, this court F finds that RW had failed to discharge her burden of proving that the sum of RM4,400 given to PH just before the wedding reception was a loan. This court also finds that RW had failed to prove that she had loaned PH the additional sum of RM6,000 or that she left her ring and gold chain in PH's parents house and that he had taken both items. Accordingly, RW's prayer for the return of G the sum of RM10,400 and the return of the ring and gold chain are dismissed.

[42] There is no order as to costs.

H *Divorce petition and cross-petition and all prayers sought by both parties dismissed.*

Reported by Ashok Kumar

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